Study L-4000 June 5, 1997

Memorandum 97-41

Health Care Decisions: Staff Draft (Incorporating Uniform Health-Care Decisions Act into Probate Code)

This memorandum presents a first staff draft showing how the Uniform Health-Care Decisions Act and the California Natural Death Act could be combined in a reorganized Division 4.5 (Powers of Attorney and Health Care Decisions) of the Probate Code. At the meeting, we plan to focus on parts of the draft statute as well as some general issues, which are outlined below.

The following materials are attached to this memorandum as exhibits:

BACKGROUND

The Commission has considered a variety of health care decisionmaking issues in earlier memorandums. General issues of the scope of the study were considered in Memorandum 96-34 (May 1996 meeting) and Memorandum 96-39 (July 1996 meeting). The Natural Death Act was reviewed in detail in Memorandum 96-66 (January 1997 meeting). The terminology and advance health care directive provisions of the Uniform Health-Care Decisions Act (UHCDA) were considered in Memorandum 97-4 (April 1997 meeting).

The anchor of these discussions has been the Power of Attorney Law (PAL) (Prob. Code § 4000 *et seq.*) which includes the durable power of attorney for

health care and was enacted on Commission recommendation. The need to review the health care power statutes has been recognized for several years. And although the health care power statutes were moved to the Probate Code when the PAL was created out of the Civil Code in 1994, the Commission reserved the health care issues for later consideration. We are now conducting this second part of the power of attorney law reform and approaching the project from the perspective of the 1993 Uniform Health-Care Decisions Act.

The Commission has decided that the subject of the Natural Death Act (California's "living will" statute, Health & Safety Code 7185 *et seq.*) should be placed in the Probate Code with the PAL and that the UHCDA should be used as a model for its revision. The PAL itself should be reviewed from the perspective of the UHCDA.

The goal of these reforms will be to unite the law governing powers of attorney for health care, "living wills" and other health care instructions, and statutory surrogates and family consent. Of course, conservatorships and court authorized medical treatment are already covered in the Probate Code. This is the same goal sought by the UHCDA. (For an overview of the UHCDA, see Exhibit pp. 1-8.)

ISSUES TO BE CONSIDERED

The attached staff draft statute attempts to implement the Commission's overall policy directions and focus the discussion on specific language in context, as decided at the April meeting. Some broad issues are considered in this memorandum and specific issues and questions are scattered throughout the draft in Staff Notes. At the meeting, we will attempt to focus the discussion on draft language, but much of the drafting is very preliminary and is included to see how or whether it fits.

Location and Organization

The content of the draft is necessarily affected by its structure, and some strain is put on any organizational scheme by the set of subjects covered in this study. Commentary on the Uniform Health-Care Decisions Act cites the aggregation of these matters in a single, comprehensive act as a virtue, as opposed to much existing state legislation which "has developed in fits and starts, resulting in an often fragmented, incomplete, and sometimes inconsistent set of rules." (English & Meisel article, Exhibit p. 1.)

But in the California code system organized by broad subjects, there is no ideal location for the UHCDA. Perhaps the Health and Safety Code would be best, since it deals with health care and hospitals and currently includes the Natural Death Act. Maybe provisions concerning physicians should be in the appropriate part of the Business and Professions Code. The Civil Code contains rules on confidentiality of medical information (Civ. Code § 56 *et seq.*) and historically has contained law on almost every subject. Or maybe the Family Code is a good place, since the surrogacy rules focus on consent by family members. The Welfare and Institutions Code could also be considered.

The name of the Probate Code does not suggest that it is an appropriate place to put any health care decisionmaking law. But the name notwithstanding, it does contain the law on guardianships and conservatorships, court-ordered medical treatment, durable powers of attorney for health care, DNR instructions, the Secretary of State's health care power registry, and due process in competency determinations. In addition, the "probate court" traditionally exercises jurisdiction appropriate to determine issues arising in this area. So by a process of elimination, as well as by custom and familiarity, the Probate Code is the strongest candidate. There are some distinct advantages to using the Probate Code. It is more likely to be available than most other codes. Specialized codes such as the Health and Safety Code are not included in desk sets or 6-in-1 code publications. The Probate Code is better organized than most codes, and has a number of general and definitional provisions that improve usability. We do not believe that UHCDA should be distributed among different codes, and to that extent concur with the uniform act's goal of having a unified statute.

Once we have settled on the Probate Code, we must decide where to put the new material. This in part depends on how much the existing rules governing powers of attorney are going to be changed. Keep in mind that the 1994 PAL attempted to apply general provisions to all powers of attorney, whether for property, health, or other purposes. Are health care provisions in the PAL to be wrenched out of that law to be superseded by the UHCDA? If that were done (as recommended by the Uniform Commissioners), we would need to revise the PAL to merge the once-general rules into the now non-health care power of attorney law, since it would be inappropriate to preserve "general" rules that apply to only one type of instrument. This would also bring two Commission operating principles into play: (1) the Commission is reluctant to recommend substantial changes in recent legislation, and (2) the "Commission has

established that, as a matter of policy, unless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation [Minutes, December 1971]."

There are a number of possibilities for placement of this material in the Probate Code:

(1) **New Part (commencing with Section 850 or 900) in Division 2 (General Provisions)** —There are 17 parts in Division 2 covering a host of subjects. Part 17 concerns "legal mental capacity" and ends with Section 813. There is plenty of room in this division before Division 3 starts at Section 1000. A new Part 18 could be placed at Section 820 or 850 or 900.

(2) **New Division 3.5 (commencing with Section 1300)** —The new division would follow General Provisions and precede Guardianship, Conservatorship, and Other Protective Proceedings (Division 4). There is sufficient room between Sections 1265 and 1400. This is our tentative choice for the best location.

(3) **New Division 4.3 (commencing with Section 3950)** —This would locate the new division between Guardianships etc. (Division 4) ending with Section 3925 and the Power of Attorney Law (Division 4.5) starting with Section 4000.

(4) **New Division 4.7 (commencing with Section 4950)** —This would follow right after the Power of Attorney Law, which ends at Section 4948. Division 5 (Multiple Party Accounts) starts with Section 5000, so there would not be very much room here, unless some of the provisions in Part 4 (Durable Powers of Attorney for Health Care) and Part 5 (Judicial Proceedings Concerning Powers of Attorney) were renumbered. This is not a bad alternative, since the provisions in Part 4 will need to be substantially revised anyway, but renumbering sections is never very popular with the bar and can cause confusion for the courts and others who use the statute. We doubt, however, that very many have found occasion to use these judicial proceeding sections, so the friction of renumbering would not be too great. This alternative also has the virtue of achieving a more logical order to the statutes than alternative (2), but it is more disruptive.

(5) **New Division 12 (commencing with Section 22000)** —This would place the new statute at the end of the Probate Code, following Division 11 on Construction of Wills, Trusts, and Other Instruments (§§ 21101-21541). This provides plenty of room, but requires five-digit section numbers and estranges the statute from its related provisions.

(6) **Revised Part 4 (commencing with Section 4600) of Division 4.5** —This would place the uniform act within the Power of Attorney Law. We would need to rename the division to reflect its broader scope. Since Part 4 (Durable Powers of Attorney for Health Care) will need to be substantially revised anyway, this alternative makes some sense. There is also plenty of room; Part 4 starts with Section 4600 and Part 5 starts with Section 4900. Additional restructuring may be needed as the drafting proceeds.

We saved the best alternaive for last. The attached staff draft adopts the 6th alternative and adds one new wrinkle — by further dividing Division 4.5 into "titles" (which are not otherwise used in the Probate Code), the conflict can be minimized between statutes organized on the concept of powers of attorney

(mostly existing law) and the statutes organized on the concept of health care decisionmaking (UHCDA and NDA).

The new titles and the new and existing chapters in the draft statute are organized as follows:

TITLE 1. POWERS OF ATTORNEY
- PART 1. DEFINITIONS AND GENERAL PROVISIONS
  - Chapter 1. Short Title and Definitions
  - Chapter 2. General Provisions
- PART 2. POWERS OF ATTORNEY GENERALLY
  - Chapter 1. General Provisions
  - Chapter 2. Creation and Effect of Powers of Attorney
  - Chapter 3. Modification and Revocation of Powers of Attorney
  - Chapter 4. Attorneys-in-Fact
  - Chapter 5. Relations with Third Persons
- PART 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY

TITLE 2. HEALTH CARE DECISIONS
- PART 1. [UNIFORM] HEALTH CARE DECISIONS [ACT]
  - Chapter 1. Definitions and General Provisions
  - Chapter 2. Durable Powers of Attorney for Health Care
  - Chapter 3. Advance Health Care Directives
  - Chapter 4. Optional Statutory Form of Advance Health Care Directive
  - Chapter 5. Health Care Surrogates
  - Chapter 6. Duties of Health Care Providers
  - Chapter 7. Immunities and Liabilities
- PART 2. ADVANCE HEALTH CARE DIRECTIVE REGISTRY
- PART 3. REQUEST TO FOREGO RESUSCITATIVE MEASURES

TITLE 3. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY AND HEALTH CARE DECISIONS
- Chapter 1. General Provisions
- Chapter 2. Jurisdiction and Venue
- Chapter 3. Petitions, Orders, Appeals

A complete outline showing article headings and a complete table of contents showing section headings are set out at the beginning of the attached staff draft.

The staff recognizes that these organizational issues can be intensely dull to consider and that it is difficult to decide on the best structure in the abstract. It is only in the drafting and review process that we will determine whether the approach outlined is workable. The staff made some preliminary attempts with drafting a separate division for insertion in the Probate Code, but the difficulties in linking the power of attorney statutes into a separate UHCDA division seemed to far outweigh any tensions created by placing the UHCDA in the same division

as the PAL. However, if it appears that another approach would be better, we can certainly try it out and see how it works.

Surrogacy

California law does not codify general rules governing who may make health care decisions for an incompetent adult in the absence of an advance directive or court involvement. The patient information pamphlet ("Your Right To Make Decisions About Medical Treatment") prepared by the California Consortium on Patient Self-Determination and adopted by the Department of Health Services contains the following:

> **What if I'm too sick to decide?**
>
> If you can't make treatment decisions, your doctor will ask your closest available relative or friend to help decide what is best for you. Most of the time, that works. But sometimes everyone doesn't agree about what to do. That's why it is helpful if you say in advance what you want to happen if you can't speak for yourself. There are several kinds of "advance directives" that you can use to say *what* you want and *who* you want to speak for you.

Discussions before the Commission and the limited amount of commentary received so far indicate general support for legislation in this area. Adoption of Section 5 of the UHCDA would fill this gap. To focus the discussion, the surrogacy rules drawn from the UHCDA are set out in Sections 4770-4778, at pp. 92-95 of the attached staff draft.

A concise overview of the UHCDA surrogacy rules is contained in the article by David English and Alan Meisel, included in the Exhibit at pages 6-8. You should read this part of the article for a brief discussion of the general law on surrogates and family consent and how it ties into the approach of the UHCDA. Also attached is an useful analysis of UHCDA Section 5 in light of California case law and some suggested approaches prepared by Tina Chen, a third-year law student at the University of Pennsylvania Law School who has been doing work for the Commission under Penn's public interest program.

The draft statute simply presents the substance of the UHCDA in our style of using shorter sections. This language should help focus the Commission's discussion of the issues raised by authorizing statutory surrogates to make health care decisions for adults who have not given advance directives.

As in the case of wills and trusts, most people do not execute a power of attorney for health care or an "individual instruction" or "living will." Estimates vary, but it is a safe guess to say that fewer than 10% have advance directives. Consequently, from a public policy standpoint, the law governing advance directives affects far fewer people than a law on consent by family members and other surrogates. The staff believes that even if we were not considering the power of attorney for health care statute and the Natural Death Act or revision, addition of some form of surrogacy rules would be an important project. As the law of wills is complemented by the law of intestacy, so the power of attorney for health care needs to be complemented by an intestacy equivalent — surrogate health care decisionmaking.

After the Commission has completed its first review of the UHCDA surrogacy rules in the draft statute, when time permits the staff plans to offer additional surrogate consent possibilities drawn from the law of other states. For the time being, it is worth noting that New Mexico has revised its version of the UHCDA to set out the following surrogacy rules (N.M. Stat. Ann. § 24-7A-5 (1995):

> B. An adult or emancipated minor, while having capacity, may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> (1) the spouse, unless legally separated or unless there is a pending petition for annulment, divorce, dissolution of marriage or legal separation;
>
> (2) an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being;
>
> (3) an adult child;
>
> (4) a parent;
>
> (5) an adult brother or sister; or
>
> (6) a grandparent.
>
> C. If none of the individuals eligible to act as surrogate under Subsection B of this section is reasonably available, an adult who has exhibited special care and concern for the patient, who is

familiar with the patient's personal values and who is reasonably available may act as surrogate.

Warnings

Existing law provides lengthy statutory form warnings in ALL CAPS and requires warnings in printed forms and a special warning in attorney-drafted forms. To what extent is this scheme needed? The staff hopes that these warnings can be simplified and eliminated unless really necessary. As they exist now, the warnings are probably an impediment to using the durable power of attorney for health care or are ignored due to their length and format. The draft statute adopts the UHCDA optional form (see draft Section 4761, pp. 70-79) in place of the existing statutory form (existing Section 4771, p. 79-89), and so eliminates one of the warning provisions. But the other provisions remain to be disposed of. See, e.g., existing Sections 4703-4704, pp. 53-56. The State Bar Estate Planning, Trust and Probate Law Section Executive Committee supports simplification of the warnings provisions. See Exhibit p. 15.

Other Issues

Many additional issues will surface as the Commission and other interested persons review the draft. The draft statute does not begin to resolve the contradictory rules concerning revocation of advance directives. Another major area involves who can make capacity determinations and what standards should apply. See, e.g., Exhibit pp. 16-17 (remarks relayed from Marc Hankin). Witnessing requirements present a number of difficult issues, both technical drafting matters and political concerns.

Respectfully submitted,

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